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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 155

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

H. E. MARTIN AND W. H. PORTER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

WALTER LEAKE,
MEADE T. SPICER, JR.,
Counsel for Petitioner.

(35,070)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 939

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

H. E. MARTIN AND W. H. PORTER.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your petitioner, The Chesapeake and Ohio Railway Company, respectfully represents that it is aggrieved by a final judgment entered by the Supreme Court of Appeals of Virginia on the 20th day of March, 1930, against petitioner and in favor of H. E. Martin and W. H. Porter, for the sum of $1,684.39, with interest from November 16th, 1925, in a certain action at law, wherein petitioner was plaintiff in error and the said Martin and Porter were defendants in error.

Summary Statement of the Matter Involved.

This action was instituted by the said Martin and Porter (sometimes hereinafter called plaintiffs) against petitioner (sometimes hereinafter called defendant) in the Law & Equity Court, Part Two, of the City of Richmond, Virginia, for the recovery of damages for the misdelivery of a carload shipment of potatoes, while being transported on a through bill of lading in interstate commerce. Plaintiffs were the owners of the potatoes, and defendant was the terminal or delivering carrier, under the bill of lading issued by the initial carrier.

The action was defended upon the ground that the plaintiffs were barred from any recovery as a matter of law, on account of their failure to comply with a provision of the bill of lading, which as a condition precedent to recovery, required that claims for damages based upon failure to make delivery, must be filed in writing with the carrier, "within six months * * * after a reasonable time for delivery has elapsed" (Rec. 100).

At the close of the plaintiffs' evidence in rebuttal, the defendant did not controvert the charge that there had been a misdelivery of the shipment, but filed a demurrer to the evidence, predicated upon the bill of lading provision referred to above. Subject to the ruling of the Court upon the demurrer to the evidence, the jury returned a verdict for the plaintiffs in the sum of $1,684.39, with interest from November 16th, 1925 (Rec. 45). Thereafter the Court overruled the demurrer to the evidence and entered final judgment for the plaintiffs in accordance with the jury's verdict, a written

opinion being delivered and made a part of the record (Rec. 127-132).

A writ of error to this judgment was awarded by the Supreme Court of Appeals of Virginia, and on June 14th, 1928, that Court affirmed the judgment of the trial court, a written opinion being rendered (Rec. 135). A petition for rehearing was granted by the Supreme Court of Appeals and that Court again affirmed the judgment of the trial court on March 20th, 1930, with a supplemental written opinion, the judgment becoming final on that date (Rec. 150).

The Supreme Court of Appeals of Virginia, in the opinion delivered on its original hearing of the case, said in part (Rec. 137).

> "Through no fault of the plaintiffs, there was as a result of defendant's negligence, a misdelivery of the potatoes. This action upon the part of the defendant was equivalent to nondelivery. Plaintiffs had a right to rely upon their notification to defendant to deliver their potatoes to Bowman's Warehouse. This being true, we cannot say that plaintiffs have failed in carrying out their part of the contract as to notice, when they were in ignorance of the breach of contract upon the part of defendant as to delivery. It must be conceded that plaintiffs promptly made claim when they discovered the true state of affairs."

In the supplemental opinion delivered on the rehearing, the Court further said (Rec. 151).

> "The decision upon the former hearing was placed upon two theories: First. That the evi-

dence was, upon a demurrer thereto, sufficient to justify the trial court in holding that the notice required by the bill of lading was given in a reasonable time; Second. That under the facts and circumstances of this case, Martin and Porter should be permitted a recovery for the loss of the potatoes, which was directly due to the negligence of the defendant in the non-delivery of the car of potatoes, and that the company is estopped from asserting the defense of lack of notice."

Reasons Relied on for the Allowance of the Writ.

In holding that the written claim for damages ultimately furnished by the plaintiffs was sufficient, because presented within a period which it considered could be regarded as "reasonable time" for the giving of notice, and in further holding that the defendant was "estopped from asserting the defense of lack of notice," the Supreme Court of Appeals of Virginia has declined to enforce and give effect to a valid provision of the bill of lading.

The holdings and decisions complained of are believed to be erroneous for the following reasons:

(1) The bill of lading provision requiring written claim for damages to be filed within six months after a reasonable time for delivery was applicable and operated as a complete bar to plaintiffs' claim.

(2) Defendant was not estopped from relying upon plaintiffs' failure to comply with the bill of lading provision as a defense to this action.

(3) Finding that plaintiffs had no notice of the misdelivery of the shipment until the day before written

claim was presented was erroneous and without evidence to support it.

The matters involved are of a Federal nature, and are of peculiar gravity and importance to shippers and carriers. They are believed to have been decided in a way not in accord with applicable decisions of this Court.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights and liabilities of the petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Appeals of Virginia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 508, The Chesapeake and Ohio Railway Company, plaintiff in error and H. E. Martin and W. H. Porter, defendants in error, and that the said judgment of the Supreme Court of Appeals of Virginia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
By WALTER LEAKE,
MEADE T. SPICER, Jr.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The opinions rendered by the Supreme Court of Appeals of Virginia, on June 14th, 1928, and on March 20th, 1930, have not been officially reported, but have been reported in 143 South Eastern Reporter at page 629, and in 152 South Eastern Reporter at page 335, respectively. Copies of these respective opinions are found at pages 135 and 150 of the record. The opinion rendered by the trial court is copied at page 128 of the record.

Jurisdiction of This Court.

The controlling question raised by the defendant in the trial court, as well as in the Supreme Court of Appeals of Virginia, and decided adversely to it, was that, as a matter of law, the plaintiffs were barred from any recovery against the defendant, by reason of their failure to comply with a valid and applicable provision of the bill of lading, issued by the initial carrier of the shipment, pursuant to Section 20 of the Interstate Commerce Act, as amended. This question was necessarily Federal in character, and the jurisdiction of this court to review the judgment on certiorari seems clear.

C. & O. Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416;

Davis v. John L. Roper L. Co., 269 U. S. 158;

Georgia, etc., R. Co. v. Blish Milling Co., 241 U. S. 190;

C. C. C. & St. L. R. Co. v. Dettelbach, 239 U. S. 588.

Statement of Facts.

In the fall of 1925, the plaintiffs, who were residents of counties lying in close proximity to the City of Richmond, Virginia, were associated as partners in the purchase and sale of potatoes, negotiations being conducted in Martin's name (Rec. 46, 64, 65, 88). They had contracted to purchase a number of cars of potatoes from the Michigan Potato Growers Exchange, to be delivered at Richmond, subject to the right of inspection at that point (Rec. 46, 48). Arrangements had been made to have the potatoes stored there at a warehouse known as the Bowman Warehouse, and the plaintiffs had notified the defendant that all cars accepted by them were to go to that warehouse (Rec. 47). To save certain switching charges, the defendant was instructed to hold the shipment at its Richmond receiving yards, known as Fulton Yards, pending inspection and acceptance or rejection by the plaintiffs (Rec. 47, 84, 111).

On November 6th, 1925, the carload of potatoes involved in this action was received by the Pere Marquette Railway Company at Wyman, Michigan, for transportation to Richmond (Rec. 48, 98). Under the straight bill of lading then issued the shipment was consigned to the Michigan Potato Growers Exchange, "advise H. E. Martin" (Rec. 98). Defendant duly

received the car as delivering carrier under the bill of lading, and it arrived at Fulton Yards on November 12th (Rec. 94).

The plaintiffs did not accept the shipment until November 16th, on which date they inspected it at Fulton Yards. On the same day they took up the shipper's draft at the bank, and went to the defendant's Freight Office, where they paid the accrued freight and demurrage charges, and presented the necessary order from the Michigan Potato Growers Exchange, authorizing delivery of the shipment to them (Rec. 47, 48, 49, 123).

To make delivery at the Bowman Warehouse, the defendant would have to transfer the car to an interchange track, where it would be picked up and placed by the Southern Railway. The usual time required for carrying out this movement was shown to be not more than forty-eight hours (Rec. 95, 103-104). Through error on the part of the defendant, the car was not switched to the Bowman Warehouse, but was delivered to another warehouse in Richmond, operated by one D. S. Harwood (Rec. 94, 103). The latter, thinking that the potatoes belonged to a customer of his, unloaded and stored them (Rec. 71-72).

On November 24th, the proprietor of the Bowman Warehouse by mistake mailed to the plaintiffs a warehouse receipt to the effect that the potatoes from this car had been received and stored in his warehouse (Rec. 49).

On December 22nd, the proprietor of the Bowman Warehouse advised the plaintiffs by letter that the above receipt had been issued in error, and asked for its return, stating that this particular shipment "was not

stored in our warehouse but was placed in the warehouse of D. S. Harwood" (Rec. 49, 50, 65). Within a few days thereafter, the plaintiffs made two trips to the Bowman Warehouse and also had a conversation with its proprietor, as a result of which they felt satisfied that all of their potatoes were accounted for at this warehouse, and dismissed the matter from their minds (Rec. 50, 51, 56). They made no inquiries whatever at the Harwood Warehouse or at defendant's office (Rec. 60, 61). They did, however, subsequently visit the Bowman Warehouse from one to three times a week during the several succeeding months, and disposed of various other lots of potatoes stored there (Rec. 55, 61, 92).

Harwood was not acquainted with the plaintiffs. He had no reason to suspect that they were the owners of the shipment until May 10th, 1926, on which date he communicated with them by letter (Rec. 72). They thereafter came to his warehouse and identified the potatoes, finding them to be almost entirely spoiled and worthless, however, as a result of exposure to cold and heat (Rec. 54, 87-88). Some of the potatoes were subsequently sold, and the net sum of $70.61 was realized from the entire lot (Rec. 74). The plaintiffs showed that the value of the shipment when it reached Richmond, had been at least the sum of $1,755.00, which was the amount of the shipper's draft (Rec. 64, 83).

Written claim for damages admittedly was not presented until May 26th, 1926, which was six months and twenty days after the shipment had left Wyman, Michigan (Rec. 53, 63, 67).

The bill of lading issued by Pere Marquette Railway at Wyman, Michigan, was shown to be the Uniform Bill of Lading prescribed in the Official, Southern and Western Classifications, and adopted by all of the carriers participating in the transportation of the shipment (Rec. 98).

Sec. 2(*b*) of this bill of lading was as follows:

> "Claims for loss, damage, or injury to property must be made in writing to the originating or delivering carrier or carriers issuing this bill of lading within six months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export), or in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; provided that if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. Suits for loss, damage, injury, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed. Provided, That in case the claim on which suit is based was made in writing within six months, or nine months in case of export traffic (whether or not filing of such claim is required as a condition precedent to recovery), suit shall be instituted not later than two years and one day after notice in writing is given by the carrier to the claimant that the carrier has disallowed the

claim or any part or parts thereof specified in the notice."

Defendant presented evidence showing that a reasonable time for the transportation of the shipment from its point of origin and its delivery to a consignee in Richmond would be "about eight days" (Rec. 112-113). No proof was presented which was in conflict with this evidence.

Specification of Error.

The judgment in this case has been awarded and affirmed against the defendant in disregard of rights accorded it by Section 20 of the Interstate Commerce Act, as amended, and applicable common law principles recognized and enforced in Federal Courts, in the following manner:

Error in overruling and refusing to sustain defendant's demurrer to the evidence, on the ground that the evidence showed as a matter of law that the plaintiffs failed to comply with the bill of lading provision which required written claim for damages to be filed within six months after a reasonable time for delivery of the shipment had elapsed.

Summary of Argument.

No recovery should be allowed in this case upon the facts shown in evidence for the following reasons:

(1) THE BILL OF LADING PROVISION REQUIRING WRITTEN CLAIM FOR DAMAGES TO BE FILED WITHIN SIX MONTHS AFTER A REASONABLE TIME FOR DELIVERY WAS APPLICABLE AND OPERATED AS A COMPLETE BAR TO PLAINTIFFS' CLAIM.

(2) DEFENDANT WAS NOT ESTOPPED FROM RELYING UPON PLAINTIFFS' FAILURE TO COMPLY WITH THE BILL OF LADING PROVISION AS A DEFENSE TO THIS ACTION.

(3) FINDING THAT PLAINTIFFS HAD NO NOTICE OF THE MISDELIVERY OF THE SHIPMENT UNTIL THE DAY BEFORE WRITTEN CLAIM WAS PRESENTED WAS ERRONEOUS AND WITHOUT EVIDENCE TO SUPPORT IT.

(1.)

The bill of lading provision requiring written claim for damages to be filed within six months after a reasonable time for delivery was applicable and operated as a complete bar to plaintiffs' claim.

The Supreme Court of Appeals of Virginia, apparently conceding that the written notice of claim presented on behalf of the plaintiffs on May 26th, 1926, was not filed within the period prescribed by the bill of lading, namely "six months * * * after a reasonable time for delivery has elapsed," nevertheless held this notice to be sufficient, because it was filed within a period which could be considered as a reasonable time for giving notice (Rec. 137, 151). The necessary effect of this holding was to adjudge the bill of lading provision to be unreasonable and invalid as applied to the facts of the instant case.

The shipment being interstate, it is manifest that the rights, duties and obligations of the parties thereto, are determined by acts of Congress, the bill of lading

and common law principles recognized and enforced in Federal Courts.

Adams Express Co. v. Croninger, 226 U. S. 491;
Sou. Express Co. v. Byers, 240 U. S. 612;
C. N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319.

The right of a carrier to require that claims be filed within a specified period as a condition precedent to liability, has long been upheld in this Court, provided the time allowed is not unreasonably short.

Davis v. John L. Roper L. Co., 269 U. S. 158;
Barrett v. Van Pelt, 268 U. S. 85;
M. K. T. R. Co. v. Harriman, 227 U. S. 657;
Mo. Pac. R. Co. v. Wall, 241 U. S. 87;

If it can be said from the opinions of the Supreme Court of Appeals of Virginia, that it meant to hold that the notice of claim furnished was in fact given within the specified period fixed by the bill of lading—namely, "six months * * * after a reasonable time for delivery has elapsed," it is submitted that this finding would be not only without evidence to support it, but in conflict with all of the evidence in the record relating to this issue, and hence not binding upon this Court.

Ætna Life Ins. Co. v. Dunken, 266 U. S. 389, 393-394;
C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474.

The notice of claim given on May 26th, 1926, was six months and twenty days after the shipment left Wyman, Michigan. The witness Neiss, Assistant Chief

Clerk at defendant's Freight Office at Richmond, who had had twenty years' experience in handling inbound shipments, testified that a reasonable time for the transportation and delivery of the shipment involved, would be "about eight days," and that anything more than this would be considered a delayed movement (Rec. 112-113). The shipment actually moved from its point of origin to defendant's Fulton Yards at Richmond, within six days (Rec. 48, 94). Neiss further testified that this was a "reasonable movement" (Rec. 112-113). Adding to this the two days usually required for delivery to the Bowman Warehouse (Rec. 94-95, 103), there is made up the eight days referred to by the witness, and thus the actual time made in the transportation of this shipment confirms his testimony as to what was a reasonable time for the delivery of the shipment to a consignee at Richmond. No objection was made to the testimony of this witness at the trial, he was not cross-examined on this issue, and no testimony of a contradictory nature was offered. His evidence should have been accepted.

Kansas City S. R. Co. v. C. H. Albers Com. Co., 223 U. S. 573, 595.

If a proper construction of the bill of lading provision, as applied to the instant case, should postpone the commencement of the period of six months and "a reasonable time for delivery," until the day on which the plaintiffs accepted the car, after seeing it at Fulton Yards, namely, on November 16th, 1925, the notice of claim on May 26th, 1926, would be six months and

ten days thereafter. The evidence showed, however, that for switching the car from Fulton Yards to the interchange track and from thence to the Bowman Warehouse, a total distance of slightly more than two miles, a period of forty-eight hours would clearly suffice, and the notice of claim would still be too late (Rec. 95, 103).

(2.)

Defendant was not estopped from relying upon plaintiffs' failure to comply with the bill of lading provision as a defense to this action.

As a basis for its holding that the defendant was "estopped from asserting the defense of lack of notice," the Supreme Court of Appeals of Virginia found that the plaintiffs did not actually know there had been a misdelivery until May 25th, 1926, the day before notice of claim was presented. It was not contended by the plaintiffs that the defendant had actively hindered or delayed any effort on their part to ascertain the whereabouts of the shipment or to present claim for its loss, since they did not communicate with any of its representatives. Nor did it appear that anyone connected with the defendant knew that the car had been sent to the wrong place, since its records indicated that an order for its delivery to the Harwood Warehouse had been received (Rec. 114).

But regardless of the correctness of the above finding as to the plaintiffs' knowledge of the misdelivery, the defendant was incapable of varying, by express design or otherwise, the terms of its responsibility

under the bill of lading and the classifications in effect, and the binding force of the limitation, as to the time for filing claims, could not be avoided.

In *Georgia, etc., R. Co. v. Blish Milling Co.*, 241 U. S. 190, it was said at page 197:

> "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

And in *Texas & Pac. R. Co. v. Leatherwood*, 250 U. S. 478, it was further said at page 481:

> "The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice."
>
> *Davis v. Henderson*, 266 U. S. 92;
> *M. K. T. R. Co. v. Ward*, 244 U. S. 383;
> *Southern R. Co. v. Prescott*, 240 U. S. 632.

The Supreme Court of Appeals of Virginia seemingly recognized that the significant language used by

this Court, in the above decisions, precluded any application of the doctrine of estoppel. It elected, however, to follow a prior Virginia decision, construed to support a contrary view, and stated in its first opinion (Rec. 137):

> "Whatever may be the decision of the court elsewhere, we are of opinion that the doctrine laid down in *Chesapeake & Ohio Ry. Co. v. Rebman &c.*, 120 Va. 71, should be adhered to."

In its supplemental opinion, the court reiterated that the instant case "is ruled" by the above decision, thereby disregarding the fact that the question presented was of a Federal nature, and that the decisions of this Court were controlling authority, irrespective of state law or contrary views of public policy (Rec. 152).

Adams Exp. Co. v. Croninger, 226 U. S. 491;
Amer. Railway Exp. Co. v. Levee, 263 U. S. 19.

Not only was a plea of estoppel unavailable to the plaintiffs as against the limitation regarding the filing of claims, but it is further submitted that the burden of showing compliance with this provision rested upon them, as one of the essential elements of the cause of action. They offered no proof whatever on this issue.

C. & O. Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416;
Amer. Railway Exp. Co. v. Levee, 263 U. S. 19;
Southern R. Co. v. Prescott, 240 U. S. 632.

The view adopted by the Supreme Court of Appeals of Virginia ignores the fact that the very purpose of

stipulations of this character, and the ground upon which they are sustained, is to facilitate prompt investigation of claims.

The damage suffered by the plaintiffs was not occasioned by the mere fact that the shipment was delivered to the Harwood Warehouse. It resulted from the potatoes being left there too long. There was evidence in the record to the effect that for a period of six weeks or more after delivery the potatoes were in as good condition as if they had been stored in any other warehouse (Rec. 76). Hence by a prompt investigation and report of the facts to the defendant, the damage could have been prevented.

(3.)

Finding that plaintiffs had no notice of the misdelivery of the shipment until the day before written claim was presented was erroneous and without evidence to support it.

The plaintiff Porter, on direct examination, testified as follows (Rec. 49-50).

> "Q. When was the first time that you knew that this particular car had not been delivered to the Bowman Warehouse?
>
> A. I think it was the 26th day of December. It was about thirty days after we paid the freight on the car that we got a letter from Mr. Wyatt asking us to return his warehouse receipt on this particular car; that he didn't have it.

Q. Had Mr. Wyatt issued a warehouse receipt for this car?

A. Yes, sir."

This party then identified as the source of his information, the following letter received by Martin and himself from the proprietor of the Bowman Warehouse (Rec. 50, 65).

"RICHMOND, VA., *Dec.* 22, 1925.

H. E. Martin & Co.,
Lanexa, Va.

GENTLEMEN:

Thru error we mailed you under date of Nov. 24th, our warehouse Memorandum receipt for 260 bags Potatoes from Car FGE 41759.

This car was not stored in our warehouse but was placed in the warehouse of D. S. Harwood, and we ask that you return us this receipt, which you will find is numbered N. G. 6494.

Wishing you a merry Christmas, and with the personal regards of the writer, we are,

Yours very truly,
BOWMAN TRANSFER & STORAGE
WAREHOUSE CO.
CLARENCE WYATT, JR."

It is true that the plaintiffs, without making any inquiry at Harwood's or at defendant's office, thereafter made two trips to the Bowman Warehouse to investigate this matter, as a result of which they became satisfied as to the quantity of potatoes held for their account at that warehouse (Rec. 50, 51, 56). This

circumstance, however, cannot obscure or overcome the admitted fact that in December, 1925, or six months before presenting claim, the plaintiffs had notice both as to the misdelivery and as to the delivery and storage of the potatoes at Harwood's Warehouse. Furthermore, the plaintiffs were fully chargeable with the information which the warehouseman, who was their agent, had necessarily obtained before writing the letter of December 22nd.

Hence the finding of fact of the Supreme Court of Appeals of Virginia that the plaintiffs "did not know, until the day before the notice was given, that the potatoes had not been delivered," is not only without substantial support in the evidence, but directly contrary to it, and not conclusive upon this Court (Rec. 152).

Creswell v. Grand Lodge K. of P., 225 U. S. 246, 261;

Postal Tel. Cable Co. v. Newport, 247 U. S. 464, 473;

Ward v. Love County, 253 U. S. 17, 22.

Conclusion.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia should be reversed.

WALTER LEAKE.
MEADE T. SPICER, JR.